No. 89-1322

In the Supreme Court of the United States

OCTOBER TERM, 1990

OKLAHOMA TAX COMMISSION, PETITIONER

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the counterclaim for declaratory and injunctive relief asserted by petitioner Oklahoma Tax Commission against the respondent Citizen Band Potawatomi Indian Tribe is barred by tribal sovereign immunity.

2. Whether the holdings in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe,* 474 U.S. 9 (1985), that a State may tax the purchase of cigarettes by nonmembers of the Tribe at a store owned and operated by Indians on an Indian Reservation are inapplicable in Oklahoma because Oklahoma has not acquired jurisdiction over Indian country pursuant to Public Law 280, Pub. L. No. 83-280, 67 Stat. 588, as amended.

3. Whether the holdings in *Moe* and *Colville* that a State may not tax sales of cigarettes to members of a Tribe on an Indian reservation apply to sales made to members of respondent Citizen Band Potawatomi Indian Tribe at a store operated by the Tribe on land held in trust by the United States for the benefit of the Tribe.

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INTEREST OF THE UNITED STATES

The United States' interest in this case arises from its special relationship with the Indian Tribes. *United States* v. *Klamath Indians,* 304 U.S. 119, 123 (1938). The historical immunity of Indian Tribes from suit is an important part of the protection afforded tribal sovereignty by federal law, and it furthers current statutory policies of encouraging tribal self-determination and economic development. The United States also has an interest in assuring that these policies are respected in the development of principles governing state taxation of matters affecting Indians. At the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. Respondent is a federally recognized Indian Tribe and is organized under the Oklahoma Indian Welfare Act (OWIA), 25 U.S.C. 503. Pursuant to an 1867 Treaty, a 30-square-mile Reservation was established for the Tribe in Oklahoma. 15 Stat. 531. Under an 1890 Agreement, portions of the Reservation were allotted to tribal members and the remainder was ceded by the Tribe to the United States. Act of Mar. 3, 1891, § 8, 26 Stat. 1016. The ceded lands were then opened to non-Indian settlement. Pet. App. A12-A13.

Article II of the 1890 Agreement provided that certain ceded lands would be retained by the United States as long as they were needed for its use or for Indian purposes. 26 Stat. 1017-1018. Several such tracts, totalling approximately 280 acres, that had been retained for the Shawnee Indian Agency and an Indian farm school were conveyed by Congress to the Tribe in fee in 1960 and 1964. Act of Sept. 13, 1960, 74 Stat. 903; Act of Aug. 11, 1964, 78 Stat. 392.[1] In 1976, pursuant to a special Act of Congress, the land was conveyed back to the United States, to be held in trust for the Tribe. Act of Jan. 2, 1975, 88 Stat. 1922. That conveyance was intended to facilitate economic development on the land, since federal financial assistance was available for projects on land held in trust. S. Rep. No. 877, 93d Cong., 2d Sess. 2, 4 (1974); H.R. Rep. No. 1586, 93d Cong., 2d Sess. 2, 4 (1974). The Tribe subsequently constructed a convenience store on a portion of the land, assisted by federal funds administered by the Department of Housing and Urban Development. Pet. App. A13-A14.

2. The State of Oklahoma levies an excise tax on the sale of cigarettes, at a total rate of $2.30 per carton. Pet. 3; Okla. Stat. Ann. tit. 68, §§ 301 *et seq.* (West 1966 & Supp. 1990). The tax must "be evidenced by stamps which shall be furnished by and purchased from the Tax Commission." § 302 (Supp. 1990). The stamps must be affixed to the cigarettes by any wholesaler that

[1] See H.R. Rep. No. 1661, 86th Cong., 2d Sess. (1960); S. Rep. No. 1605, 86th Cong., 2d Sess. (1960); H.R. Rep. No. 1490, 88th Cong., 2d Sess. (1964); S. Rep. No. 1255, 88th Cong., 2d Sess. (1964).

maintains a place of business in the State; if the wholesaler does not affix the stamps, the retailer must do so. § 305(a) and (b). The retailer, in turn, must collect the tax from the customer, and the "impact of the tax" is expressly "declared to be on the vendee, user, consumer or possessor of cigarettes." § 302 (Supp. 1990). If a person has sold unstamped cigarettes, the Commission may require that person to pay twice the amount of tax due. § 305(c). In addition, unstamped cigarettes held for transportation, sale, or consumption in violation of the law (and vehicles and personal property used for that purpose) are subject to seizure by and forfeiture to the State. § 305(d).

Oklahoma also levies a 4.75 % sales tax on the sale of tangible personal property, including cigarettes. Okla. Stat. Ann. tit. 68, § 1354.1 (Supp. 1990). The sales tax "shall be paid by the consumer or user to the vendor as trustee for and on account of this state," § 1361(A), and the vendor must "collect from the consumer or user the full amount of the tax" and pay it to the Commission. *Ibid.*

If a taxpayer fails to pay either tax, the Commission must determine and issue a proposed assessment of the amount due. The recipient may file a protest within 30 days. If he fails to do so, or if his protest is rejected, the assessment becomes final, subject to review by the Oklahoma Supreme Court. When a final assessment is filed with the court clerk, it has the same effect and may be executed in the same manner as the final judgment of a state court, and it constitutes a lien on any real estate of the taxpayer in the county. Okla. Stat. Ann. tit. 68, § 221 (Supp. 1990).

3. a. The Tribe sells cigarettes at its store without affixing state tax stamps and without collecting the state cigarette or sales tax from either Indian or non-Indian customers. Pet. App. A17-A18. In February 1987, the Commission issued a proposed assessment to the Chairman of the Tribe's governing body, the Tribal Business Committee, for excise taxes allegedly due on sales of more than 6 million packs of cigarettes at the Tribe's store between December 1, 1982, and September 30, 1986. The amount of tax due was $1,108,413.90; the proposed assessment was for twice that amount plus a 10% penalty ($110,841.39) and

accrued interest ($363,801.51), for a total of $2,691,470.70. Br. in Opp. App. A24-A26; Okla. Stat. Ann. tit. 68, §§ 217 and 305(c) (Supp. 1990). The assessment rendered the Chairman personally liable for the entire amount due. Pet. App. A2.

The Tribe immediately instituted this action for an injunction barring the Commission and its agents "from entering [the Tribe's] Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against [the Tribe], [the Tribe's] officers, agents or employees." Br. in Opp. App. A6-A7. The complaint also sought "such further necessary and proper relief as may be just." *Id.* at A7.

b. Soon after this suit was filed, the Commission withdrew its assessment against the Chairman and issued a new assessment for the same amount against the Tribe. Pet. App. A2, A23-A24. The Commission then filed its answer and a counterclaim for declaratory and injunctive relief, pursuant to Fed. R. Civ. P. 13(a). Br. in Opp. App. B1-B7. The Commission alleged in its counterclaim that the Tribe's sale of cigarettes to the general public without payment of state taxes is inconsistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), which upheld application of state taxes to purchases of cigarettes by non-Indians from Indian retailers on a reservation. Br. in Opp. App. B5-B6. The Commission sought (i) a declaratory judgment sustaining its right to tax all of the Tribe's cigarette sales and to enforce its tax laws by assessments and injunctions, and (ii) an injunction barring the Tribe from selling cigarettes upon which the state excise and sales taxes have not been collected and remitted. *Id.* at B6.

The Tribe moved to dismiss the counterclaim, arguing that it is barred by tribal sovereign immunity. The district court rejected that defense, holding that the "relief sought by the [Commission] is so intertwined with the relief sought by the [Tribe] that the counterclaim falls within the scope of waiver contained in the [Tribe's] complaint." Br. in Opp. App. C3. The court

found this result analogous to the doctrine of equitable recoupment, under which a defendant may offset against the plaintiff's monetary claim an amount that the defendant would otherwise be barred from recovering. *Id.* at C3-C4; see also Pet. App. A21-A22.

c. In its final judgment and opinion, Pet. App. A9-A22, the district court first held that the land on which the tribal store is located is a reservation, and therefore "Indian country" within the meaning of 18 U.S.C. 1151(a). It reasoned that a formal designation as a "reservation" is not required, and that it is sufficient if Congress intended to reserve the lands for a Tribe and vest primary jurisdiction in the federal and tribal governments. Pet. App. A15-A16. The court found that test satisfied here, since the United States holds the land in trust for the Tribe in order to foster tribal economic development. *Id.* at A16. It therefore held that this case falls under the usual rules governing application of state law on Indian reservations: although a State may "under certain circumstances" assert authority over activities of nonmembers on a reservation and in "exceptional circumstances" may even assert authority over activities of tribal members, a "*per se* rule" bars "taxation of on-reservation activities of tribal members." *Id.* at A18 (quoting *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 & n.17 (1987)).

Applying these principles, the court held that "the Tribe itself not only is exempt from payment of state sales tax (such exemption is recognized and acknowledged by the [Commission] in pleadings to this Court) but also is immune from liability for the instant assessment since payment of the tax falls not on the ultimate consumer but in this situation on the Tribe." Pet. App. A19; see also *id.* at A21 ("the instant assessment against the Tribe for payment of cigarette sales tax unremitted from 1982 to 1986 is improper").[2] The court also held that "purchasers of cigarettes at the tribal store who are [tribal] members are exempt from payment of state sales tax." *Ibid.* (citing *Moe*, 425 U.S. at

[2] We construe these and other references by the district court to "sales" taxes to include cigarette excise taxes as well.

480-481). On the other hand, because it found the legal incidence of the tax to be on the purchaser, Pet. App. A18, the court held that under *Moe* and *Colville*, the State may tax cigarette sales to nonmembers and that the Tribe must assist the State in collecting those taxes in the future and comply with state record-keeping requirements. *Id.* at A19-A21. The court entered declaratory relief (presumably on the Commission's counterclaim) embodying the foregoing principles. *Id.* at A9-A10.

On the Tribe's claim for injunctive relief, the court ordered that "[the Commission and its officers] are immediately and permanently enjoined from assessing any state sales taxes against and/or collecting any state sales taxes from the [Tribe]" and "from collecting any state sales taxes on purchases by members of [the Tribe] at the Potawatomi Tribal Store." Pet. App. A10. However, consistent with its declaratory relief regarding *Moe* and *Colville*, the court denied what it understood to be the Tribe's "request" for "further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." *Ibid.*

4. a. On appeal, the Tribe argued (C.A. Br. i, 10-20) that the district court should not have reached the merits of the Commission's counterclaim because it is barred by tribal sovereign immunity. The court of appeals agreed. Pet. App. A2-A5. It explained that "Indian tribes have sovereign immunity from suits to which they do not consent, subject to plenary control [by] Congress," and that "[t]he Supreme Court has held that an Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff." *Id.* at A3 (citing *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940)). It also held that the compulsory counterclaim requirement of Fed. R. Civ. P. 13(a) "cannot be viewed as a congressional waiver of the Tribe's immunity," because Rule 13(a) "is explicitly intended to require joinder of only those claims that might otherwise be brought separately." Pet. App. A4. Finally, the court rejected the district court's "recoupment" rationale for allowing the counterclaim, noting that recoupment is an equitable defense to a suit for a money judgment, and cannot be used to obtain affirmative relief. *Ibid.*

b. Because the court of appeals found the Commission's counterclaim barred by tribal sovereign immunity, it had no occasion to reach the Tribe's alternative argument (C.A. Br. i, 20-36; C.A. Reply Br. 15-20) that the district court erred on the merits of the counterclaim insofar as it declared that the State may tax cigarette sales to nonmembers at the tribal store and that the Tribe must assist the State in collecting such taxes. But the court did address those issues in connection with the Tribe's claim for injunctive relief.

The court of appeals first agreed with the district court that the tract on which the tribal store is located is Indian country for present purposes, since it is within the boundaries of the Tribe's original reservation and is held by the United States in trust for the Tribe. The court therefore found this case distinguishable from *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), which sustained application of a state gross receipts tax to income from a tribal ski resort located on land *leased* from the United States and situated *outside* the Tribe's reservation. Pet. App. A5-A6.

The court then reasoned that because the store is located within Indian country, the Tribe "retain[s] sovereign powers" with respect to the store and, correspondingly, "Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." Pet. App. A7. The court found no such grant of authority here. It distinguished *Colville* on the ground that the Tribe there "had opted to come under state jurisdiction" pursuant to Public Law 280,[3] while Oklahoma has not assumed jurisdiction under Public Law 280. *Ibid.* The court therefore held that "the district court improperly denied the [Tribe's] request to enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes," and it remanded for entry of a permanent injunction to that effect. *Ibid.*

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[3] Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 25 U.S.C. 1321-1326 and 28 U.S.C. 1360.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that the Commission's state-law counterclaim for declaratory and injunctive relief is barred by tribal sovereign immunity. As the Commission essentially concedes, that holding is compelled by decisions of this Court, including *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512 (1940), which held a counterclaim barred by tribal sovereign immunity. Immunity to suit is a necessary corollary to Indian sovereignty and self-governance, and it furthers the statutory goals of encouraging tribal self-sufficiency and economic development. Any waiver of tribal sovereign immunity must be unequivocally express, and there is no such waiver here. Although the Commission argues that tribal sovereign immunity should be reconsidered, the Court has made clear that it is up to Congress to decide whether immunity should be eliminated in any given setting.

II. A. The question of the State's power to tax cigarette sales to nonmembers is properly before the Court because it is subsumed in the question whether the State may assess the Tribe for taxes due on such sales. On the merits, *Moe, Colville* and *Chemehuevi* establish the State's right to tax sales to nonmembers at the tribal store. The court of appeals erred in distinguishing this case on the ground that Oklahoma has not assumed jurisdiction over Indian country under Public Law 280. *Moe, Colville* and *Chemehuevi* did not turn on Public Law 280, and the Court has held that Public Law 280 does not confer taxing authority on a State. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

B. The courts below properly concluded that the tribal trust land in this case is a "reservation" for purposes of the further holding in *Moe* and *Colville* that a State may not tax on-reservation cigarette sales to tribal members. That conclusion is supported by the similar holding in *United States* v. *John*, 437 U.S. 634 (1978), regarding land taken in trust by the United States, and by decisions of other courts, Interior Department interpretations, and recent legislation recognizing the important tribal interest in such lands.

ARGUMENT

I. THE COMMISSION'S COUNTERCLAIM IS BARRED BY TRIBAL SOVEREIGN IMMUNITY

A. 1. This Court stated in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977).[4]

The Court adhered to this settled rule in *Santa Clara Pueblo* itself, holding that "[i]n the absence of any unequivocal expression of contrary legislative intent, * * * suits against the tribe under the [Indian Civil Rights Act (ICRA), 25 U.S.C. 1301 *et seq.*] are barred by its sovereign immunity from suit." 436 U.S. at 58-59.

Indian Tribes' immunity to suit is rooted in their status as "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), which even today exercise inherent sovereign authority over their members and territory. See *Duro* v. *Reina*, 110 S. Ct. 2053, 2060-2061 (1990); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). The Court recently reaffirmed the rule of tribal sovereign immunity and the foundation on which it rests in *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877 (1986). There, the Court held that a State may not condition an Indian Tribe's access to state courts on the Tribe's waiver of its sovereign immunity to all civil causes

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[4] See also *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895); *Haile* v. *Saunooke*, 246 F.2d 293 (4th Cir. 1957); *Maryland Casualty Co.* v. *Citizens Nat'l Bank*, 361 F.2d 517, 520 (5th Cir. 1966); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1067 (1st Cir. 1979); *Morgan* v. *Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968); *Atkinson* v. *Haldman*, 569 P.2d 151 (Alaska 1977); cf. *Native Village of Stevens* v. *Alaska Mgt. & Planning*, 757 P.2d. 32, 34 (Alaska 1988).

of action, because such a condition would "invite[ ] a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* at 890-891. Thus, sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Id.* at 890; see also *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512 & n.10; *United States* v. *Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981).

Tribal sovereign immunity also plays an important practical role in protecting and preserving tribal self-determination: If Indian Tribes were subject to suits without their consent, scarce tribal resources would be exposed to the expense of litigation and adverse money judgments, which could deprive the Tribes of their ability to furnish necessary services to their members. Cf. *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, 67 (discussing financial impact on Tribes that would result from implied right of action against tribal officers under ICRA).[5] As the Eighth Circuit observed in *Adams* v. *Murphy*, 165 F. 304, 308-309 (1908):

> Upon considerations of public policy such Indian tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments.

Accord, *Thebo* v. *Choctaw Tribe*, 66 F. at 376.

This economic basis for tribal sovereign immunity also finds strong support in the policy – implemented by Congress in such statutes as the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education

[5] As explained below (see page 16, *infra*), a bill introduced during the last Congress would have provided a cause of action against a Tribe or its officers for injunctive or other equitable relief under the ICRA, and would have waived tribal sovereign immunity to that extent. The bill would not, however, have authorized suits for money damages. Even suits for prospective relief would cause Tribes to incur litigation expenses, but such an amendment to the ICRA presumably would rest on a congressional judgment that that is an acceptable cost of protecting the federal rights secured by the ICRA.

Assistance Act of 1975, 25 U.S.C. 450 *et seq.* – of promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)). In fact, in the Indian Self-Determination Act, which establishes the framework for federal financial support of tribal governments in furtherance of those goals, Congress expressly provided that nothing in the Act shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. 450n.

Congress also took account of tribal sovereign immunity in enacting the Indian Reorganization Act. The IRA authorizes a Tribe both to adopt a constitution for the conduct of its government (§ 16, 25 U.S.C. 476) and to receive a separate charter of incorporation to enable it to engage in business activities through a separate entity (§ 17, 25 U.S.C. 477). The principal reason for the latter provision was concern that non-Indian entities would not enter into commercial dealings with the tribal government because of its immunities. 65 Interior Dec. 483, 484 (1958); R. Strickland, *et al.*, *Felix Cohen's Handbook of Federal Indian Law* 325-326 (1982) [hereinafter *1982 Cohen*]. Accordingly, charters of incorporation issued under Section 17 of the IRA often contain a clause allowing the corporation to sue or be sued, but this waiver is limited to the business dealings and assets under the control of that corporation and does not extend to the Tribe in its sovereign capacity, as organized under Section 16 of the IRA. *1982 Cohen* at 325-326;[6] compare *Loeffler* v.

[6] The courts have recognized that these two entities are distinct and that a "sue and be sued" clause in a corporate charter does not waive the immunity of the Tribe as a constitutional entity. *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Construction Co.* v. *Mescalero Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982); *Gold* v. *Confederated Tribes*, 478 F. Supp. 190, 196 (D. Ore. 1979); *Atkinson* v. *Haldane*, 569 P.2d 151, 170-175 (Alaska 1977); but see *Martinez* v. *Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962). Although the Eighth Circuit expressed a contrary view in *Fontenelle* v. *Omaha Tribe*, 430 F.2d 143 (1970), it subsequently held that such a clause in a Section 17 charter does not waive immunity

Frank, 486 U.S. 549, 554-557 (1988), and *Kiefer & Kiefer* v. *RFC*, 306 U.S. 381 (1939)(discussing "sue and be sued" clauses applicable to government corporations).

The same distinction appears in the Oklahoma Indian Welfare Act. In addition to authorizing Oklahoma Tribes to adopt a constitution and receive a corporate charter under Sections 16 and 17 of the IRA (see 25 U.S.C. 503), the OIWA authorizes any ten or more individual Indians to form a cooperative association, chartered by the Secretary of the Interior. 25 U.S.C. 504. The OIWA expressly provides that such an association "may sue and be sued" in state or federal court. 25 U.S.C. 505. The absence of any similar authorization to sue the tribal governments organized under Section 503 of the OIWA (and Section 16 of the IRA) reinforces the conclusion that those governments remain protected by the established rule of immunity.[7]

2. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress," and Congress therefore may authorize suits against Indian Tribes. *Santa Clara Pueblo*, 436 U.S. at 58. But any such waiver of the Tribe's sovereign immunity "cannot be implied but must be unequivocally expressed." *Ibid.* (quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976)). As the Court recognized by quoting *Testan*, this rule conforms to the standard for finding a waiver

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for actions taken pursuant to a Tribe's constitution. *American Indian Agricultural Credit Consortium* v. *Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-1380 (1985).

[7] Contrary to the Commission's contention (Pet. 16), the immunity of the Tribe in *Puyallup* applied to off-reservation activities. See *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 167, 171 (1977). Accordingly, even if the Commission were correct that the land at issue here is not a reservation or does not otherwise have a special Indian character for purposes of substantive Indian law principles, the Tribe's sovereign immunity would nevertheless bar the Commission's counterclaim. That is also clear from *U.S. Fidelity & Guaranty Co.*, since under the Commission's submission (Br. 9-21), the Choctaw and Chickasaw Nations' reservations in Oklahoma had long since been abolished, and the Court made clear that immunity exists "even after dissolution of the tribal government." 309 U.S. at 512. Cf. *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (tribe retains authority over inheritance of non-reservation, non-trust property). See also note 16, *infra*.

of the United States' own sovereign immunity to suit. It also conforms to the standard for finding congressional authorization of suits against a State, notwithstanding its Eleventh Amendment immunity. *Dellmuth* v. *Muth*, 109 S. Ct. 2397, 2400 (1989).

The Commission does not suggest that Congress has enacted a law authorizing it to sue the Tribe for twice the amount of taxes allegedly due on past transactions (plus penalties and interest) or for declaratory and injunctive relief regarding application of the State's tax laws. And, while we may assume that a Tribe may waive its immunity to suit if its consent is clearly stated,[8] the Commission points to no such waiver by the Tribe here.

Finally, the court of appeals correctly held that the bar of sovereign immunity is not rendered inapplicable because the Commission sought relief in a counterclaim under Fed. R. Civ. P. 13(a), rather than in a direct action against the Tribe. Pet. App. A4. The Commission, in fact, does not contend otherwise. The Tribe plainly did not *intend* its initiation of the suit to constitute consent to the Commission's broad counterclaim,[9] and there is no basis for concluding that the Tribe's filing of this suit abrogated its sovereign immunity by operation of law.[10] This Court rejected such an argument in *U.S. Fidelity & Guaranty Co.*, holding that sovereign immunity barred a cross-claim

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[8] See, *e.g.*, *Puyallup*, 433 U.S. at 170; *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *McClendon* v. *United States*, 885 F.2d 627, 630-631 (9th Cir. 1989); *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982).

[9] See Br. in Opp. App. A2 (Complaint ¶ 1) ("Plaintiff submits to this Court's jurisdiction for the limited purpose of securing the equitable relief prayed for herein."). Compare *United States* v. *Oregon*, 657 F.2d at 1015; *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 772-773 (D.C. Cir. 1986).

[10] Fed. R. Civ. P. 13 does not purport to dispense with a Tribe's sovereign immunity. See Advisory Committee Note 5 to Rule 13 (counterclaim provisions are subject to the limitation in Fed. R. Civ. P. 82 that the Rules are not to be construed to extend the district courts' jurisdiction). Moreover, Fed. R. Civ. P. 13 was not enacted by Congress, and it therefore could not in any event overcome sovereign immunity. See 28 U.S.C. 2072(b) (rules "shall not abridge, enlarge or modify any substantive right").

against a Tribe because "[t]he desirability for complete settlement of all issues between parties must * * * yield to the principle of immunity." 309 U.S. at 512-513.[11] Other courts have adhered to this rule in the specific context of a state counterclaim filed in response to an action brought by a Tribe to prevent application of state taxes to on-reservation sales of cigarettes. See *Chemehuevi Indian Tribe* v. *California Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985) (quoted at Pet. App. A4), rev'd on other grounds, 474 U.S. 9 (1986); *Confederated Tribes of Colville Indian Reservation* v. *Washington*, 446 F. Supp. 1339, 1351 (E.D. Wash. 1978) (three-judge court), aff'd in part and rev'd in part on other grounds, 447 U.S. 134 (1980).[12]

B. The Commission does not argue that the sovereign immunity ruling below conflicts with this Court's precedents or with decisions of other courts.[13] To the contrary, it concedes

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[11] Contrary to the Commission's contention (Br. 31; Pet. 12-13), tribal sovereign immunity was central to the Court's holding in *U.S. Fidelity & Guaranty Co.* The Court took note of "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent," and the Court found the cross-claim barred because "[i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." 309 U.S. at 512.

[12] The court below correctly rejected the district court's reliance on the doctrine of equitable recoupment as a basis for entertaining the Commission's counterclaim. Pet. App. A4. Equitable recoupment permits a defendant to offset a monetary award in favor of the plaintiff by an amount the plaintiff owes the defendant arising out of the same transaction. It is not a basis for awarding affirmative relief. See *United States* v. *Dalm*, 110 S. Ct. 1361 (1990); *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511 & n.6 (citing *Bull* v. *United States*, 295 U.S. 247 (1935)). In *Three Affiliated Tribes II*, the Court noted the Tribe's concession that the non-Indian defendant could assert a setoff or recoupment arising out of the same transaction, but it declined to consider whether a counterclaim might also be used to fix the Tribe's affirmative liability. 476 U.S. at 891 & n.*.

[13] In a decision not cited by the Commission or the panel below, the Tenth Circuit previously held that the ICRA dispensed with a Tribe's sovereign immunity to a damages action brought under that Act by a nonmember who had no remedy in a tribal forum. *Dry Creek Lodge, Inc.* v. *Arapaho-Shoshone Tribe*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981). *Dry Creek Lodge* is plainly inconsistent with *Santa Clara Pueblo*, which does not limit a Tribe's immunity to suits arising from intra-tribal disputes; to the contrary, the Court relied on earlier decisions which did not involve intra-tribal disputes. See 436 U.S. at 58 (citing *Puyallup*, 433 U.S. at 172-173, and *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512-513). Furthermore, *Dry Creek Lodge* rests on the spurious premise that "[t]here has to be a forum where the dispute can be settled," 623 F.2d at 685; the very purpose of sovereign immunity is to protect the sovereign against suits in *any* court, unless immunity has been waived. For these reasons, the Ninth Circuit has rejected the *Dry Creek Lodge* analysis, *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979, 981 (1983), and the Tenth Circuit has avoided following *Dry Creek Lodge* by reading it extremely narrowly. See, *e.g.*, *Nero* v. *Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (1990). See U.S. Amicus Br. (at 13-14) in *Puckett* v. *Native Village of Tyonek*, petition for cert. pending, No. 89-609.

In any event, *Dry Creek Lodge* is of no relevance here. This case arises under state law (see note 16, *infra*), not the ICRA, and there accordingly can be no contention here, as there was in *Dry Creek Lodge*, that Congress must have intended there to be a forum to obtain redress for violations of rights Congress itself created.

(Br. 28-29) that *U.S. Fidelity & Guaranty* and *Puyallup* furnish "compelling" support for the Tribe's claim of immunity. The Commission argues (Br. 29, 31-32; Pet. 12, 16-17), however, that the Court should reconsider the doctrine of tribal sovereign immunity.

As we have explained, the Court has repeatedly held that an Indian Tribe is absolutely immune from suit without its consent unless Congress dispenses with the immunity. Although Congress has occasionally authorized suits against Tribes where it believed the public interest so required,[14] it has not enacted any general abrogation of tribal sovereign immunity. To the contrary, Congress has endorsed and acted upon the long-established principle that Indian Tribes are immune from suit.

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[14] See *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 509, 513 (special statutory authorization for cross-claims); *Green* v. *Menominee Tribe*, 233 U.S. 558 (1914)(special jurisdictional statute for adjudication of claims by Indian traders against Tribe); *United States* v. *Gorham*, 165 U.S. 316 (1897) (discussing Indian Depredation Act of 1891, ch. 538, 26 Stat. 851); see generally *Thebo* v. *Choctaw Tribe*, 66 F. at 373-374 & n.1; *1982 Cohen* 324. Cf. 25 U.S.C. 450f(c) (requiring carrier insuring Tribe under Indian Self-Determination Act to "waive any right it may have to raise as a defense the sovereign immunity of the Indian tribe from suit," but only up to policy limit and excluding liability for pre-judgment interest and punitive damages).

See, *e.g.*, 25 U.S.C. 450n; pages 11-12 *supra*. There is accordingly no reason for this Court to reexamine its own precedents affirming that principle.

Furthermore, the question of tribal sovereign immunity is involved in studies by the Commission on Civil Rights and Congress concerning enforcement of the Indian Civil Rights Act and its interaction with the traditional sovereign powers of Indian Tribes.[15] A bill was introduced during the last Congress that would have authorized suits against Indian Tribes and tribal officers for injunctive or other equitable relief (but not money damages) to secure compliance with the ICRA. S. 517, 101st Cong., 1st Sess. (1989). The bill would have expressly waived the sovereign immunity of Tribes to those suits, but required exhaustion of tribal remedies before such a suit could be brought. The effect of the bill, if enacted, would have been to allow certain of the suits this Court held in *Santa Clara Pueblo* were barred by sovereign immunity as against the Tribes and were not authorized by the ICRA as against tribal officers.

In these circumstances, this would not, in our view, be a suitable occasion for the Court to reexamine the firmly established doctrine of tribal sovereign immunity, even if such a reexamination might sometime be called for. That is especially so in view of the fact that, unlike the plaintiffs in *Santa Clara Pueblo*, the Commission in this case does not invoke any substantive rights conferred on it by an Act of Congress. Its counterclaim arises entirely under *state* law. Because the Court has repeatedly held that only Congress may dispense with a Tribe's sovereign immunity, the Court should not undertake to do so itself where Congress has not even enacted a substantive rule of conduct to which the abrogation of sovereign immunity from suit might be tied. See *Three Affiliated Tribes II*, 476 U.S. at 891 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from

[15] *Hearings Before the United States Comm'n on Civil Rights: Enforcement of the Indian Civil Rights Act* (1986-1988) (5 vols.); *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Comm. on Indian Affairs*, 100th Cong., 1st Sess. (1988).

diminution by the States"); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d at 1056; *Haile* v. *Saunooke*, 296 F.2d at 297-298.[16]

[16] In *Oklahoma Tax Comm'n* v. *Graham*, 109 S. Ct. 1519 (1989), the Court held that the Commission's suit against the Chickasaw Nation and the manager of a tribal enterprise to collect unpaid state cigarette taxes was one arising under state, not federal law, and therefore could not be removed by the Nation to federal district court. After the *Graham* case was remanded back to the state courts following this Court's jurisdictional ruling, the trial court dismissed the case, finding it barred by tribal sovereign immunity. *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, No. C-85-223 (Dist. Ct. Murray Cty. July 18, 1989). The Commission's appeal of that dismissal has been briefed and is pending before the Oklahama Supreme Court (No. 73,729).

The Oklahoma Supreme Court previously held in *Oklahoma ex rel. May* v. *Seneca-Cayuga Tribe*, 711 P.2d 77, 83-84 (1985), cited by the Commission (Br. 26; Pet. 10-11), that tribal sovereign immunity did not bar a declaratory judgment action against a Tribe concerning the legality of its bingo operations under state law. However, the Oklahoma Supreme Court erroneously relied on the balancing approach applied by this Court in determining whether state *substantive* law applies to reservation activities, rather than the absolute rule, consistently followed by this Court, that the Tribe itself is immune from suit. The Tenth Circuit subsequently affirmed a preliminary injunction barring further state-court proceedings in *Seneca-Cayuga*, in part because of the Oklahoma Supreme Court's clear error on the tribal sovereign immunity issue. *Seneca-Cayuga Tribe*, 874 F.2d at 714-716.

In its decision following the remand to the state courts in the *Graham* case, the Murray County District Court concluded in dismissing the suit on tribal sovereign immunity grounds that the Oklahoma Supreme Court's *Seneca-Cayuga* decision should not be followed in light of this Court's intervening decision in *Three Affiliated Tribes II*, 476 U.S. at 890-891, which makes clear that an Indian Tribe is immune from suit in state court absent federal authorization. Slip op. 3. The District Court also rejected the Commission's argument that as a result of allotment and statehood, Indian Tribes in Oklahoma are not protected by sovereign immunity. It explained that this position could not be reconciled with *Turner* v. *United States* and *U.S. Fidelity & Guaranty Co.*, "each of which involved Oklahoma Indian tribes and were decided long after [the Commission] contends the tribes were stripped of immunity." Slip op. 3-4.

II. THE JUDGMENT BELOW SHOULD BE VACATED INSOFAR AS IT CONCERNS INJUNCTIVE RELIEF IN FAVOR OF THE TRIBE, AND THIS ASPECT OF THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION

Although the court of appeals correctly ordered dismissal of the Commission's counterclaim on sovereign immunity grounds, it erred with respect to a central aspect of the Tribe's request for injunctive relief. On the premise that the State may not tax any purchases of cigarettes at the tribal store, whether by members or nonmembers, the court ordered the entry of broad injunctive relief in favor of the Tribe. It is well settled under *Moe*, *Colville* and *Chemehuevi*, however, that a State may tax on-reservation sales of cigarettes to nonmembers.

Because the court of appeals held *all* sales of cigarettes at the tribal store exempt from state taxes, it had no occasion to consider what measures the State might take to enforce its tax laws if those laws do apply to some such sales, and it is not clear what measures the Commission would propose to take. We therefore suggest that the Court vacate the portion of the judgment below that addresses the Tribe's request for injunctive relief and remand to the court of appeals for further consideration of that question. Compare *Colville*, 447 U.S. at 162 (declining to consider legality of possible enforcement measures). The Tribe then should be given a reasonable opportunity to assume its obligation to assist the Commission in collecting taxes on sales to nonmembers. If it does so, the matter of future enforcement measures need never be addressed.[17]

[17] Under the principles of sovereign immunity discussed in Point I, the Commission could not recover a money judgment, to be paid out of the Tribe's treasury, for taxes due on past sales (plus penalties and interest), either in a judicial proceeding or in an administrative assessment proceeding, in which the final decision has the same effect as the judgment of a state court (Okla. Stat. Ann. tit. 68, § 221 (Supp. 1990)). Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). Moreover, because the tax was not collected from the customers who purchased cigarettes at the store and the incidence of the assessment therefore would be on the Tribe, an assessment against the Tribe would conflict with the "*per se* rule" barring state taxation of Tribes and tribal members. *Cabazon*, 480 U.S. at 215 n.17; see Pet. App. A19, A21.

However, there are measures available to the Commission to ensure collection of the tax in the future. First, it may seek to enter into an agreement with the Tribe to implement the latter's duty to assist in collecting the taxes. From the Tribe's perspective, such an agreement between sovereigns concerning transactions over which they share jurisdiction would be in furtherance, not derogation, of its inherent sovereignty. See 25 U.S.C. 476 (authorizing Tribes "to negotiate with the Federal, State, and local governments"); 25 U.S.C. 2710(d) (authorizing Tribal-State compacts for certain Indian gaming). Second, if the Tribe continues to sell unstamped cigarettes, the Commission could assess the unpaid taxes against wholesalers that supply such cigarettes to the Tribe (Okla. Stat. Ann. tit. 68, § 305(a) and (c)), as it has done before. See *City Vending of Muskogee, Inc.* v. *Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990). Third, the Commission could seize and forfeit unstamped cigarettes (and the vehicle transporting them) enroute to the tribal store (Okla. Stat. Ann. tit. 68, § 305(d)). See *Coville*, 447 U.S. at 161-162. Fourth, the Commission could bring an injunctive action in an appropriate court to require tribal officers and the manager of the tribal store to collect and remit the taxes. Cf. *Santa Clara Pueblo*, 436 U.S. at 59 (sovereign immunity does not bar injunctive action against tribal officers). The Tribe's courts have jurisdiction, *inter alia*, "over all general civil claims which arise within the tribal jurisdiction, and over all transitory claims in which the defendant may be served within the tribal jurisdiction." Tribal Code of the Citizen Band Potawatomi Indian Tribe, Tribal Courts § 4.

A. Under *Moe*, *Colville* And *Chemehuevi*, The State May Tax Sales Of Cigarettes To Nonmembers At The Tribal Store

1. As an initial matter, the Tribe argues (Br. in Opp. 7-8, 10; Supp. Br. 4, 6-8 (Pet. Stage)) that the question of the State's authority to tax sales of cigarettes to nonmembers at the tribal store is not presented by this case. The proceedings in the courts below are somewhat confused, but we believe that the Court may reach the issue, and that it should do so in order to remove any doubt on the question among Oklahoma Tribes.

The Tribe sought injunctive relief principally to prevent the Commission from assessing *past* taxes against the Tribe itself, although the complaint did seek such further relief as may be just. See page 4, *supra*. The district court not only enjoined the assessment; it also enjoined the Commission "from collecting

any state sales taxes on purchases by members of [the Tribe]" and denied what it understood to be the Tribe's "request" for "further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." Pet. App. A10. These portions of the judgment address collection of state taxes on future as well as past sales.

The court of appeals held that "Oklahoma has no authority to tax the store's transactions" and distinguished *Colville* (which upheld state taxes on purchases by nonmembers) on the ground that Oklahoma, unlike the State of Washington in *Colville*, has not assumed jurisdiction under Public Law 280. The court therefore held that the district court improperly denied the Tribe's "request" to "enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes" (presumably including future sales to nonmembers), and it remanded for entry of such an injunction. Pet. App. A7.

It is not clear on what basis the court of appeals addressed this issue. The Tribe's briefs on appeal did not expressly challenge the district court's denial of injunctive relief barring collection of taxes on sales to nonmembers. On the other hand, the Tribe did argue the merits of that issue in connection with the Commission's counterclaim (C.A. Br. i, 20-36), and it urged the court of appeals to reverse the district court's judgment not only with instructions to dismiss the counterclaim, but also "to reform the judgment so it no longer grants the relief sought in the counterclaim." C.A. Br. 39. In light of this urging, the court of appeals might have concluded that an award of injunctive relief barring the Commission from exercising the authority it sought to have vindicated in its counterclaim was fairly comprised by the Tribe's submission on appeal.

There is, however, another basis on which the Court may address the question of the State's authority to tax sales to nonmembers. The Commission has consistently challenged the district court's injunction insofar as it bars the Commission from taking any steps to assess state taxes against the Tribe itself. If (as the court of appeals held) the State may not impose its tax on *any* sales of cigarettes at the tribal store (to either

members or nonmembers), then the Commission may not assess against the Tribe *any* of the taxes that the Commission alleges are due on past sales. This would be so whether or not the Tribe is correct in its further argument that the Commission may not in any event assess taxes against the Tribe itself because the incidence of the tax would then be on the Tribe, not the ultimate purchasers. It therefore would be appropriate for the Court to dispose of this threshold question of the State's authority to tax sales to nonmembers, in order to establish the context for considering what measures the Commission may take to enforce the State's tax laws in this setting.

2. On the merits, the court of appeals clearly erred in holding that all cigarette sales at the tribal store are wholly beyond the State's taxing jurisdiction. This Court has thrice held—in *Moe, Colville* and *Chemehuevi*—that where the legal incidence of a state cigarette tax is on the purchaser, a State may impose that tax on purchases by nonmembers from a tribal store on an Indian reservation and the Tribe must assist in collecting the tax. 425 U.S. at 481-483; 447 U.S. at 151, 159; 474 U.S. at 11-12. The district court here held that the legal incidence of the state tax is on the customer. Pet. App. A18. Neither the court of appeals nor the Tribe has questioned that ruling, which in any event seems compelled by the text of the Oklahoma statutes (quoted at page 3, *supra*). *Moe, Colville* and *Chemehuevi* therefore are controlling here and permit Oklahoma to impose its tax on cigarette purchases by nonmembers and to obligate the Tribe to collect the tax.

Although the particular reservations involved in *Moe, Colville* and *Chemehuevi* had been brought under the civil jurisdiction of the State pursuant to Public Law 280, in none of the three cases did the Court's holding depend on that fact. And with good reason. Public Law 280 permits a State to assume jurisdiction over "civil causes of action" in Indian country to which Indians are parties, and provides that the "civil laws" of the State that are of general application to private persons and property shall then apply in Indian country. 25 U.S.C. 1322(a), 28 U.S.C. 1360(a). In *Bryan* v. *Itasca County*, 426 U.S. 373

(1975), the Court held that these provisions of Public Law 280 only permit state courts to adjudicate disputes involving Indians and to apply state law in deciding such cases, and do not confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations. See also *Rice* v. *Rehner*, 463 U.S. 713, 734 n.18 (1983) (civil jurisdiction conferred on a State by Public Law 280 "does not include regulatory jurisdiction to tax"); *Cabazon*, 480 U.S. at 208-209, 210 n.8 (same).

Indeed, the Tribe's notion (Br. in Opp. 8) that the ruling in *Colville* may be explained by Public Law 280 is refuted by the discussion of *Bryan* v. *Itasca County* in *Colville* itself (447 U.S. at 142 n.8):

> Initially the State [of Washington] asserted [in the district court] that it could tax all tribal cigarette sales, regardless of whether the buyer was Indian or non-Indian. Its theory was that Pub. L. 280, 67 Stat. 588, granted it general authority to tax reservations. After this theory was rejected in *Bryan* v. *Itasca County, supra*, the State abandoned any claim of authority to tax sales to tribal members. 446 F. Supp., at 1346, n.4.

In light of the Court's acceptance of Washington's concession that Public Law 280 did not furnish a basis for the State to tax sales to *members*, there simply is no ground for contending that the same grant of civil jurisdiction under Public Law 280 was the essential (yet unspoken) basis for the Court's holding that the State could tax *nonmembers*.

Moreover, in *Moe*, Montana's assumption of civil jurisdiction over the Flathead Reservation under Public Law 280 was limited to particular subject matters, and the district court had held that "the power to impose cigarette and licensing taxes is *not* among the categories of assumed civil jurisdiction." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1306 (D. Mont. 1975) (three-judge court) (emphasis added). Public Law 280 therefore could not have been the basis for this Court's holding that Montana may tax sales to nonmembers. See also *Cotton Petroleum Corp.* v. *New Mexico*, 110 S. Ct. 1698 (1989)

(sustaining application of state tax to on-reservation activities of non-Indian in New Mexico, which has not assumed jurisdiction under Public Law 280).

Thus, the State's authority to tax cigarette purchases by nonmembers in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to—but rather existed independently of—Public Law 280. It follows that Oklahoma's power to tax cigarette purchases by nonmembers at the Tribe's store in this case likewise exists independently of Public Law 280, and that Oklahoma's failure to acquire civil jurisdiction under Public Law 280 therefore does not foreclose it from exercising that power.

B. Sales Of Cigarettes To Tribal Members At The Tribal Store Are Exempt From State Taxation

The Commission urges the Court to go further and to allow it to collect state taxes even on sales of cigarettes to tribal members at the tribal store. Specifically, the Commission argues (Br. 9-21) that the other relevant holding in *Moe* and *Colville*—that a State may not tax sales to tribal members on a reservation—does not apply to the tribal trust land at issue here. In our view, however, the courts below properly concluded that the Tribe's land is a reservation for purposes of *Moe* and *Colville*, and that sales to tribal members are therefore exempt from state taxation.

In holding that the tribal trust land is a reservation, the court of appeals followed this Court's decision in *United States* v. *John*, 437 U.S. 634 (1978). Pet. App. A5-A6. There, an Act of Congress declared the title to all land previously purchased for the Mississippi Choctaw Indians to be "in the United States in trust for such Choctaw Indians." Act of June 21, 1939, ch. 235, 53 Stat. 851. 437 U.S. at 646. The Court noted that the definition of "Indian country" in 18 U.S.C. 1151 was based on prior decisions of this Court construing that term, including *United States* v. *McGowan*, 302 U.S. 535, 539 (1938), which stated that the test is whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." 437 U.S. at 648-649. Applying that test, the

Court saw "no apparent reason why [the Mississippi] lands * * * did not become a 'reservation,' at least for purposes of federal criminal jurisdiction," at the time they were taken into trust by Act of Congress. *Id.* at 649. The Court further noted that "if there were any doubt about the matter," the situation was "completely clarified" by a 1944 Interior Department order proclaiming the lands to be a reservation and by the Secretary's subsequent approval of a constitution and by-laws for the Mississippi Band under the IRA. *Ibid.*

As in *John,* there is "no apparent reason" why the land at issue here did not become a reservation – at least for present purposes – when it was taken into trust by the United States for the benefit of the Tribe pursuant to an Act of Congress. A formal proclamation or designation of "reservation" status was not necessary, *McGowan,* 302 U.S. at 538-539, since the land was "validly set apart for the use of the Indians as such" – Indians who, like the Mississippi Choctaws in *John,* have adopted a constitution and by-laws under federal law and therefore are "under the superintendence of the Government." 437 U.S. at 648-649.

The decisions below on this point are consistent with the long-standing view of the Department of the Interior that tribal trust lands in Oklahoma may have "reservation" status. 58 Interior Dec. 85, 100-101 (1942); 59 Interior Dec. 1, 2 & n.5 (1943). They also are consistent with prior Tenth Circuit holdings regarding tribal lands within the boundaries of the original reservations of other Oklahoma Tribes, *Indian Country U.S.A., Inc.* v. *Oklahoma,* 829 F.2d 967, 973-976 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988); *Cheyenne-Arapaho Tribe* v. *Oklahoma,* 618 F.2d 665, 668 (10th Cir. 1980), and with similar rulings by other courts. See *Langley* v. *Ryder,* 778 F.2d 1092, 1095 (5th Cir. 1985); *United States* v. *Sohappy,* 770 F.2d 816, 822-823 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986); *State* v. *Sohappy,* 110 Wash. 2d 907, 910-912, 757 P.2d 509, 511-512 (1988); cf. *State* v. *Begay,* 105 N.M. 498, 734 P.2d 278 (App. 1987).[18]

[18] In *Oklahoma ex rel. May* v. *Seneca-Cayuga,* 711 P.2d 77, 79-83 (Okla. 1985), the Oklahoma Supreme Court held that parcels of formerly allotted land that were taken into trust by the United States for two Tribes pursuant to the OIWA (and that later became the sites of bingo operations) are "Indian country" because they remain allotments under 18 U.S.C. 1151(c). The Oklahoma Supreme Court found it unnecessary to decide whether the parcels also qualify as "reservations." See also *Enterprise Management Consultants, Inc.* v. *Oklahoma Tax Comm'n,* 768 P.2d 359, 363 n.16 (1988) (apparently assuming arguendo that Potawatomi tribal land at issue here is Indian country, but sustaining application of state sales tax to concessions of non-Indian company operating bingo games on land because company did not show it was agent of Tribe); *id.* at 366, 367-368 (Kauger, J., concurring) (land is Indian country, but tax valid because company did not show bingo operation was tribal enterprise); *Housing Auth. of the Seminole Nation* v. *Harjo,* 790 P.2d 1098 (Okla. 1990) (Indian Housing Authority is "dependent Indian community"); *C.M.G.* v. *State,* 594 P.2d 798 (Okla. Crim. App. 1979) (Indian school is "dependent Indian community").

Significantly, moreover, Congress endorsed the application of general Indian-law preemption principles to lands such as these when it passed the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.,* which essentially codifies this Court's holding in *Cabazon* that state law did not apply to a tribal bingo game on an Indian reservation. See S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988). The IGRA broadly defines the "Indian lands" on which an Indian Tribe may operate or regulate certain gambling operations to include not only lands within the limits of a reservation, but also, *inter alia,* "any lands title to which is * * * held in trust by the United States for the benefit of any Indian tribe * * * and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4)(B). In addition, although the IGRA generally prohibits gaming on lands acquired by the Secretary in trust for a tribe after passage of the IGRA, there is an exception for lands located within or contiguous to a Tribe's reservation and for lands in Oklahoma that are "within the boundaries of the Indian tribe's former reservation" or are "contiguous to other land held in trust * * * for the Indian tribe in Oklahoma." 25 U.S.C. 2719(a)(2)(A). It thus is clear from the IGRA that Congress has concluded that general principles limiting application of state law to on-reservation activities of a Tribe may properly be applied to tribal trust land such as that at issue here. Other recent legislation manifests a similar purpose to affirm tribal sovereignty over tribal trust

lands, as well as other Indian lands within the original boundaries of the Oklahoma reservations.[19]

In light of the foregoing judicial, administrative and statutory precedent, the court of appeals properly concluded that the principles of *Moe* and *Colville* that exempt sales to tribal members from state taxation should be applied to sales on the Potawatomi Tribe's trust land.[20]

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[19] See 25 U.S.C. 1452(d) ("reservation" for purposes of Indian Financing Act includes "former Indian reservations in Oklahoma"); 25 U.S.C. 1903(10) ("reservation" for purposes of Indian Child Welfare Act includes Indian country as defined in 18 U.S.C. 1151 and any other lands, not covered by that Section, "title to which is * * * held by the United States in trust for the benefit of any Indian tribe"); 33 U.S.C. 1377(c) (sewage treatment grants for Indian Tribes available in "former Indian reservations in Oklahoma"); 42 U.S.C. 2992c(2) ("reservation" for purposes of financial assistance under Native American Programs Act of 1974 includes "any former reservation in Oklahoma").

[20] The Commission's contrary argument (Br. 9-21) rests almost entirely on circumstances preceding Oklahoma's admission to the Union, when the reservations originally set aside for Oklahoma Tribes were allotted and the reservations themselves disestablished. Our submission in no way suggests that the boundaries of those original reservations continue to exist or should be reinstated, such that *all* land within those boundaries (both Indian and non-Indian) would be "Indian country." This case involves the distinct and much narrower question whether land within the boundaries of the original reservation of an Oklahoma Tribe that is held in trust for a Tribe is Indian country. The Commission's historical discussion does not address this argument, which is supported by much modern precedent.

The Commission must concede that allotments within the original reservation boundaries that are still held in trust are "Indian country" under 18 U.S.C. 1151(c), and are therefore subject to the jurisdiction of the United States and the Tribe, rather than the State. It would be perverse if land held in trust for the Tribe itself, over which the Tribe's claim of sovereignty presumably is even stronger, did not also qualify as Indian country. These circumstances, and the fact that the land was taken in trust pursuant to Act of Congress, distinguish *Mescalero Apache Tribe* v. *Jones, supra,* on which the Commission relies (Br. 9, 27, 38). There, the land in question was located *outside* the Tribe's reservation and was *leased* to the Tribe by the Forest Service. See Pet. App. A5-A6. Moreover, in *Jones,* most of the revenue that the Court found to be taxable presumably was generated by nonmember guests; this case involves the narrower question whether the State may tax transactions specifically between the Tribe and its own members at the tribal enterprise.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it directs dismissal of the Commission's counterclaim on sovereign immunity grounds. The judgment of the court of appeals should be vacated insofar as it addresses the Tribe's claim for injunctive relief, and the case should be remanded to the court of appeals for further consideration of that claim in light of the views expressed herein.

Respectfully submitted.

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